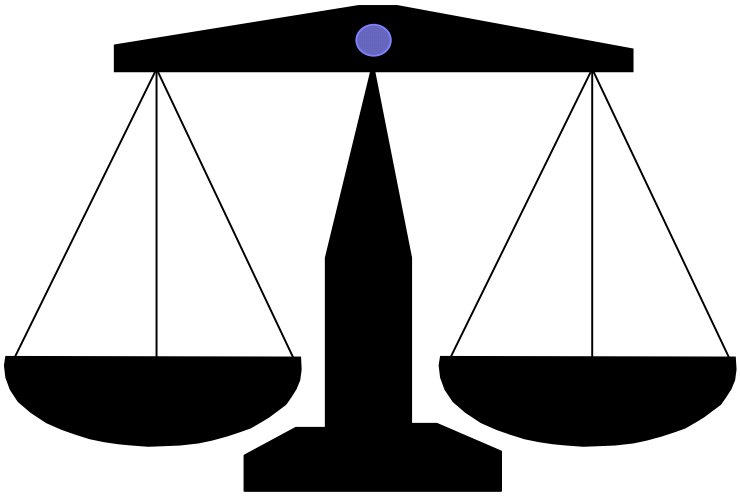
# FAIR LABOR STANDARDS ACT



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## I. INTRODUCTION

Perhaps one of the most important issues to a majority of employees is the amount, method and frequency they are paid. Although there are many reasons employees may enjoy our work, the financial rewards it generates are generally considered the primary motivation. Consequently, it is important for employers to make certain that their methods of compensation comply with all legal requirements imposed by both state and federal law. While many states have wage and hour laws, the Fair Labor Standards Act ("FLSA") is the most comprehensive statute that governs this area of the law. It is, therefore, critical for all employers to have a thorough understanding of their obligations arising under the FLSA.

## II. BASIC REQUIREMENTS

The FLSA was established in 1938 and sets standards for minimum wage, maximum hours, overtime pay, record keeping and child labor for covered employment, unless a specific exemption applies. The FLSA requires employers to:

- Maintain payroll records;
- Pay men and women equal pay for equal work;
- Pay at least the statutory minimum wage;
- Pay an overtime premium that must be at least one and one half times the average hourly straight time pay for the employee; and
- Maintain established child labor standards.

Although the FLSA is the primary federal wage law, employers must be aware that there are additional federal laws governing the payment of wages to their employees, such as the Portal-to-Portal Act and the Equal Pay Act. Like the FLSA, these statutes are designed to ensure the payment of minimum wages, overtime pay, and equal pay for equal work.

In general, the FLSA has three bases of coverage for most employers. Its minimum wage, equal pay, overtime, and child labor standards cannot be waived, either expressly or impliedly, and apply to employees, not otherwise specifically exempt, who are:

1. Engaged In Interstate Commerce -- "Commerce" is defined to embrace both incoming and outgoing foreign commerce, as well as commerce between the states;



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2. Engaged In The Production Of Goods For Commerce -- The "production" of goods includes not only the actual production operations, but also "any closely related process or occupation directly essential" to the production; and

3. Employed In An Enterprise Engaged In Commerce Or The Production Of Goods For Commerce -- Under this standard, all of the employees of a particular business unit may be covered by the Act, regardless of the relationship with their individual duties to commerce or the production of goods for commerce.

## III. JURISDICTION AND ENFORCEMENT

The FLSA is enforced by the Wage and Hour Division of the U.S. Department of Labor ("DOL"). It is headed by an Administrator, who is appointed by the President. The following enforcement measures may be taken:

1. Supervising voluntary settlements, under which the employer agrees to pay back wages due employees;
2. Suing an employer on behalf of employees who are due back wages;
3. Suing for civil penalties of up to $1,000 per violation in the case of willful or repeated violations;
4. Suing in federal court for an injunction which prevents the sale, delivery, transportation, or shipment in interstate commerce of goods produced by any worker employed in violation of the law; or
5. Suing for an injunction to compel the employer to pay minimum wages and overtime found due.

The FLSA authorizes the Administrator to establish regional and local offices to fulfill the Administrator's responsibilities. State labor agencies may also be used for this purpose pursuant to work-sharing agreements. These agencies are accountable to the Administrator.

Generally, wage and hour investigations are prompted by employee complaints. However, inspections can also arise from "spot-checks" or industry-wide reviews. Investigators have the right to inspect an employer's facilities, review records pertinent to FLSA compliance, and question employees. After the investigation is completed the employer and the investigators meet to discuss any violations found and how they can be corrected. If they do not agree on a settlement, the employer may request a consultation with the area director. If there is still no agreement on how to resolve the claims, the matter is considered for legal prosecution.



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## IV. FLSA COVERAGE AND THE EMPLOYMENT RELATIONSHIP

In order to be covered by the FLSA, an individual must have an “employment relationship” with his or her employer. The FLSA gives a broad definition to the concept of "employment." There are, however, specific exclusions for persons who work primarily for their own advantage, such as independent contractors or volunteers. In other words, unlike employees, the FLSA wage and hour requirements do not apply to independent contractors.

Additionally, independent contractors often are ineligible for employee benefits such as health insurance and retirement plans, cannot form or join labor unions. Neither are employers required to pay Social Security, Medicare and unemployment taxes, or withhold and remit income taxes for independent contractors. While companies are not prohibited from employing independent contractors, misclassifying workers as independent contractors can result in substantial liability for unpaid wages and taxes, among other consequences.

Although several tests exist in order to determine whether an employee is improperly or properly classified as an independent contractor depending on the employer obligation challenged, for FLSA purposes, the following factors are considered in determining whether an employment or independent contractor relationship exists:

1) The extent to which the services rendered are an integral part of the principal's business;
2) The permanency of the relationship;
3) The amount of the alleged contractor's investment in facilities and equipment;
4) The nature and degree of control by the principal;
5) The alleged contractor's opportunities for profit and loss;
6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and
7) The degree of independent business organization and operation.

Practically speaking, these factors are used to determine whether the worker’s livelihood is economically dependent on the company for which he or she performs services, and the test is commonly referred to as the “economic realities” test. In applying this test, courts have emphasized that no one factor is dispositive. The factors are balanced, and whether a worker is deemed an employee or properly is considered an independent contractor is fact sensitive.



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Courts also have found the following considerations persuasive:

1) If a person is granted employee benefits, such as employer-sponsored health insurance, the person may be an employee;
2) If an employer provides periodic or on-going training to the workers, they may be considered employees;
3) If workers generally use their own supplies and equipment to perform the work, they may be independent contractors;
4) If a person's relationship with the employer is indefinite and not limited to a specific project, the person may be considered an employee; and
5) If a person pays his or her own business and travel expenses, he or she may be considered an independent contractor.

Proposed legislation in Congress could make it even more difficult for companies to classify workers as independent contractors. The Employee Misclassification Prevention Act (H.R. 5107/S. 3254) would amend the FLSA to increase penalties for misclassification, would require employers to notify workers of their classification in writing, and would direct states to strengthen their own penalties for worker misclassification.

## V. CURRENT MINIMUM WAGE

Current federal minimum wage for covered, non-exempt employees is $7.25 per hour. Many states (and even some cities through living wage ordinances) also have minimum wage laws. When an employee is subject to both the state and federal minimum wage laws, the employee is entitled to the higher of the two minimum wages.

There are additional permeations to the minimum wage requirement of the FLSA for workers with disabilities, full-time students, youth under the age of 20, tipped employees, and student- learners. Prior to paying reduced wage rates to such individuals, special certificates must be obtained from the Department of Labor Administrator. Certificates will not be issued if the lower rates would curtail job opportunities of other persons. There are also special record keeping requirements.



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## VI. OVERTIME REQUIREMENTS UNDER THE FLSA

For most employees, the FLSA requires the payment of overtime wages in an amount of one and one-half times the employee's "regular rate" for all hours worked in excess of 40 in any workweek. The regular rate includes all payments made by the employer to or on behalf of the employee and is determined by adding together the employee's pay for the workweek and all other earnings and dividing the total by the number of hours the employee worked in that week.

A clear (and often violated) requirement of the FLSA is that non-discretionary bonuses must be included within the "total" compensation earned by an employee in a workweek. If, for instance, a bonus is given weekly, then the bonus must be added to the employee's total compensation for that week before dividing the total compensation by hours worked to arrive at the regular rate. If, however, the bonus is deferred over a longer period of time, the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained.

When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned, if possible. The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week.

If it is impossible to allocate the bonus amongst the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other "reasonable and equitable method of allocation" must be adopted. For example, the employer may assume that the employee earned an equal amount of bonus for each pay period over which the bonus was earned.



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## VII. WHITE COLLAR EXEMPTIONS

### A. White Collar And Other Exemptions

There are several exemptions to the overtime requirements of the FLSA, the most common of which are for "white collar" employees.

The categories of "white collar" employees under the FLSA are:

- Executive employees;
- Administrative employees;
- Professional employees; and
- Computer-related personnel

In April of 2004, the Department of Labor issued revised regulations interpreting the white-collar exemptions to the FLSA's overtime requirements. These regulations simplified the duties tests for the executive, administrative, professional and computer exemptions and modified the minimum salary requirement. The new regulations became effective on August 23, 2004.

### B. Minimum Salary Requirement

The minimum salary level for all white collar employees (including executive, administrative, professional, and computer) is $455 per week ($23,660 per year). For computer employees, the $455 salary requirement applies, but the regulations also maintain an hourly rate qualification of at least $27.63/hour.

### C. Duties Tests

The DOL has promulgated a "standard test" for each exempt classification.

#### 1. Executive Employees

For executive employees, the regulations require that: (1) the employee's primary duties consist of the management of the enterprise for which he or she is employed or of a customarily recognized department or subdivision; (2) the employee customarily and regularly direct the work of two or more other employees; and (3) the employee has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.



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### 2. Administrative Employees

The duties test for administrative employees requires that: (1) the employee's primary duty is performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; and (2) the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

### 3. Professional Employees

The former FLSA regulations contained four categories of exempt professional employees. These exemptions included: learned professionals, artistic professionals, teachers, and computer professionals. The changes to the computer professional exemption are discussed below in subpart 4.

The standard test for the professional exemption requires learned professionals to perform work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. "Work requiring advanced knowledge" is defined as work that is predominantly intellectual in character and which includes work requiring consistent exercise of discretion and independent judgment. Creative professional employees are required to perform work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. The exemption does not apply to work that can be produced by a person with general manual or intellectual ability and training.

### 4. Computer Employees

Under the regulations, an exempt computer employee must: (1) have a primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering; (2) be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; and (3) consistently exercise discretion and judgment.

Two alternative payment methods are available for exempt computer employees: (1) a weekly salary of not less than $455, or (2) an hourly rate of not less than $27.63.



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### 5. Highly Compensated Employees Performing One White Collar Duty

The DOL also has adopted a special rule for the exemption of highly compensated employees earning at least $100,000 annually. To qualify for the exemption, employees must: (1) perform office or non-manual work; (2) earn at least $100,000 in non-discretionary compensation (including commissions) being paid at least $455 per week on a salary or fee basis; and (3) customarily and regularly perform at least one of the functions that appear in the tests for executive, administrative, or professional employees.

## VIII. OTHER POSSIBLY RELEVANT EXEMPTIONS

In addition to often-popular "white collar" exemptions, there are numerous other highly specific and technical exemptions that an employer may be able to utilize to treat an employee as "exempt" from the overtime or minimum wage requirements of the FLSA. Below are some of the more common non-traditional exemptions.

### 1. Outside Sales Employees

The outside sales employee exemption applies to employees who: (1) have a primary duty of making sales or obtaining orders or contracts for service or for the use of facilities for which a consideration will be paid by the client or customer; and (2) are customarily and regularly engaged away from the employer's place or places of business in performing the primary duty. For the purposes of this exemption, making sales includes the transfer of title to tangible property, and includes the "sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition" of such tangible property. There is no salary requirement for this exemption.

In order to qualify for this exemption, the employee must truly be engaged away from the employer's place of business. This means that an outside sales employee makes sales at the customer's place of business, and not by mail, telephone, or the internet unless such these forms of contact are used as an adjunct to personal visits. Ideally, an outside sales employee spends at least 80% of his or her time outside of the office making sales or following up on current customers, and the time he or she spends in the office should be spent on work incidental to the employee's outside sales.

### 2. Retail Sales Exemption

To qualify for this exemption, three conditions must be met: (1) the employee must be employed by a retail or service establishment; (2) the employee's regular rate of pay must exceed

1 ½ times the minimum wage; and (3) more than ½ of the employee's total earnings in a representative period (not less than 1 month) must consist of commissions on goods or services.

The term "retail or service establishment" means an establishment in which 75% of its annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry. This exemption was meant to "relieve an employer from the obligation of paying overtime compensation to certain employees of retail or service establishment paid wholly or in greater part on the basis of commissions."

A common question under this exemption is whether an employee receives a "draw" vs. "salary." A pay plan may still fall under the commissioned employee exemption if the weekly draw is part of a bona fide commission plan and is not a salary, however, a draw or other stipulated sum can never qualify as commission if it is paid as a salary, meaning the employee always or nearly always receives the same pay.

### 3. Motor Carrier Act Exemption

The Motor Carrier Act exemption relieves employers from the FLSA's overtime requirements with regard to certain employees whom the Secretary of Transportation can prescribe qualification and hours of service requirements. Specifically, an employee is under the authority of the Secretary of Transportation and, thus, exempt under the Motor Carrier Act, if the employee is employed by a motor carrier (employer requirement) and is "engaged in activities of a character directly affecting the safety of operations of motor vehicles in the interstate transportation of passengers and property" (employee requirement). 29 C.F.R. § 782.2.

For purposes of the employer requirement, motor carriers include "private motor carriers," which is defined as "a person, other than a motor carrier, transporting property by motor vehicle when: (A) the transportation [involves interstate commerce]; (B) the person is the owner, lessee, or bailee of the property being transported; and (C) the property is being transported for sale, lease, rent, or bailment, or to further a commercial enterprise. 49 U.S.C. § 13102(15)."

The employee prong is more complicated and require a close examination of the facts. As noted above, in order to fall under the Secretary of Transportation's jurisdiction, the employer must show that: (1) the employee transports property involving interstate commerce; (2) the activities of the employee affect commercial motor vehicle safety; and (3) the vehicles used have a gross vehicle rating of 10,001 pounds or more.



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## D. The Salary Basis Test

### 1. Disciplinary Deductions

In order to qualify for the executive, administrative, or professional exemption, an employee must be compensated on a "salary basis." Specifically, an employee must regularly receive a predetermined amount of salary on a weekly or less frequent basis that "is not subject to reduction because of variations in the quality or quantity of the work performed." As a result, an employee must receive, with few exceptions, the full salary for any week in which the employee either performs any work or is available to perform work, regardless of the number of days or hours the employee actually worked. An employer, however, is not required to compensate an employee for any week in which an employee performs no work at all.

An employer also may make deductions from an employee's pay without forfeiting the exemption under the following circumstances: (1) for absences for one or more full days due to personal reasons other than for sickness or disability; (2) for absences for a full day due to sickness or disability if done in accordance with a bona fide sick pay plan (NOTE: an employer may not deduct for partial day absences if an employee has not yet qualified for or has exhausted PTO leave, but an employer can deduct time from an employee's available PTO bank for partial day absences); (3) to offset amounts an employee receives for jury or witness fees or as military pay; (4) for penalties imposed in good faith for infractions of safety rules of major significance (NOTE: can only be issued in full day increments); (5) for hours not worked in the initial or last week of employment; and (6) for hours taken as unpaid leave under the Family and Medical Leave Act.

### 2. Furloughs And Prospective Reductions In Salary

Many employers, both public and private, recently have considered furloughing employees or prospectively reducing employees' salaries to meet budget constraints. Employers must be careful in implementing such furloughs or salary reductions, however, as they may remove or eliminate an employee's exempt status.

Generally, FLSA regulations require than an exempt employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. With few exceptions described in case law, an employee is not paid on a salary basis, and, therefore, is not an exempt employee, if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business, such as furloughs. In other words, if the employee is ready, willing and able to work, deductions may not be made simply because work is not

available. The Department of Labor has advised, however, that a reduction in salary due to a reduced workweek or a reduction in salary for economic reasons is permissible, but such reductions cannot be implemented on a frequent basis.

There is an exception to the FLSA deduction rule for public employers. Public employers may implement furlough and accompanying pay reductions, and the deductions will not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

### 3. Window Of Correction

An employer loses an exemption only if there is an "actual practice" of making improper deductions. Moreover, if an employer is found to take improper deductions as an actual practice, the exemption is lost only during the time in which the improper deductions were made and only for the employees in the same job classifications working for the same manager responsible for the improper deductions. Further, a "safe harbor" provision protects an employer from losing the exemption if the employer: (1) has a clearly communicated policy that prohibits improper pay deductions and includes a complaint mechanism; (2) reimburses employees for any improper deductions; and (3) makes a good faith effort to comply in the future. If the above requirements are met, an employer that makes improper deductions will lose the exemption only if the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

## IX. HOT TOPICS AND RECENT LITIGATION TRENDS

### A. Meal And Rest Breaks

While most employers offer meal and coffee breaks during the normal workday, they are usually surprised to find that federal law does not mandate such breaks. However, when employers do offer short breaks (usually lasting about 5 to 20 minutes), federal law considers the breaks as compensable work hours that would be included in the sum of hours worked during the work week and considered in determining if overtime was worked. Bona fide meal periods lasting at least 30 minutes), serve a different purpose than coffee or snack breaks and, thus, are not work time and are not compensable.

Several states have passed laws which require that employers provide meal or other breaks to employees. For example, in Florida, minors must be given at least a 30 minute meal break for every 4 hours worked. Tennessee requires that employers provide at least one 30 minute break to all employees who work six consecutive hours. Kentucky also has similar meal and break laws.

## B. Time Spent Preparing Or Finishing Up Work – "Donning and Doffing"

In the past, many employers unwisely dismissed the notion that employees should be paid for time spent preparing for work, including tasks such as putting on and taking off protective equipment. This is now one of the hottest areas of FLSA law, and can create the potential for a collective action against a company. Simply put, donning and doffing claims allege that an employer has failed to pay an employee for the time it takes to put on and take off required clothing or protective gear. These claims are very common in the poultry and other agricultural industries.

Generally, the law requires that an employer pay its employees for all work time, and the Supreme Court has held that putting on and taking off specialized gear is compensable, as is the time employees spend walking to their work station after they put on specialized clothing. Time spent putting on and removing "unique" gear which is "integral and indispensable" to the work being done now starts and stops the clock on the workday. If the gear meets either standard, employers must compensate their employees for time spent changing into and out of the gear, as well as time spent walking from the changing area to the work site and waiting to remove the gear at the end of the day.

This analysis can hinge on subtle differences in the employee's daily schedule. For instance, waiting for distribution of specialized clothing or equipment before productive labor begins is not compensable, but changing into such unique clothing or equipment is compensable. Likewise, walking from a changing room on the employer's premises to a workstation before labor begins, as well as walking back to the changing room at the end of a shift may be compensable. Employees also may be entitled to be compensated for time spent removing specialized clothing or equipment at the end of a shift, as such activity is "integral and indispensable" to the employee's job.

There are a few defenses to a claim for unpaid donning/doffing time: (1) the gear is not required; (2) the gear was not specialized, and therefore, the employee does not need to be compensated for the time it takes to put on the gear (ex: hair net vs. specialized smocks and arm guards); (3) the gear is specialized, but the employee has the option to take it home with them and put it on before work (ex: boots); and (4) the time spent donning and doffing the gear is de minimis, meaning 5 minutes or less.

## C. The Use Of Technology And Issues With Employees Working Off The Clock

The increasing use of technology by employees has created issues for employers under the FLSA. The FLSA generally requires employers to compensate employees for all hours worked. Hours worked include "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." There are two issues that have increasingly become the subject of lawsuits: compensation for "boot-up" time and compensation for emails and/or internet research done after hours outside of work.

Claims involving compensation for "boot-up" time are on the rise. These claims typically allege that the employee was not paid for time spent booting-up their computer since the employee clocked in on the computer. Unfortunately, there have not been any clear rulings from the courts on this issue; however, the courts appear to be utilizing two well-established principles. The first is known as the "de minimis exception." According to the exception, "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded" for purposes of calculating hours worked. Courts applying the de minimis exception typically focus their analysis on the amount of time in dispute. In a recent class action lawsuit, however, the court indicated that the plaintiffs would likely have been entitled to compensation even if it only took 3 minutes for their computers to boot up.

The second is the Portal-to-Portal Act, which excludes "preliminary and postliminary activities" from an employee's hours worked. Activities that occur before or after the "principal work activity," which are those tasks an employee is employed to perform, are excluded under the Act unless the parties agree otherwise by contract, custom, or practice. Preliminary or postliminary activities that are "integral and indispensible" to the employee's principal work activities are, however, compensable.

Claims involving compensation for activities completed away from the office on smart phones and/or laptops also are on the rise. The above definition of "hours worked" applies to work performed away from the employer's premises, or at home, <u>if</u> the employer knows or has reason to believe that the work is being performed. According to federal regulations, it is not enough for an employer to merely promulgate a rule prohibiting employees from performing work after hours; rather, the employer must "exercise its control and see that the work is not performed if it does not want it to be performed."

As a practical matter, employers need to enforce such rules. For example, employees that violate an after hours work rule should be subject to discipline, including reprimand, suspension, and/or termination. On the other hand, employers should not refuse to pay employees for work

performed in violation of a rule, tell employees not to record their working time, or alter time cards.

## D. Traveling Time

As travel becomes a routine part of many jobs, more and more employees are demanding compensation for hours spent traveling to and from job assignments. While the rules regarding compensable travel time are complicated, the following are general guidelines.

### 1. Normal Commuting Time

As a preliminary matter, FLSA regulations state that an employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel that is considered "a normal incident of employment." This is true whether the employee works at a fixed location or at different job sites. As such, the current regulations and case law indicate that normal travel from home to work generally is not considered work time under the FLSA and, therefore, is not compensable. There are, however, two exceptions in which travel from home to work may be compensable under the FLSA.

#### a. Emergency Calls

First, the FLSA regulations provide that, if an employee who has gone home after completing his day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer's customers, all time spent on such travel is working time. It is unclear, however, whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.

#### b. Extraordinary Travel Time

Second, if an employee normally travels from home to work at various job sites, but one day he is sent on an assignment to a job site that is much further away from home than he normally travels, the difference between his normal commute time and the longer commute time is compensable if the travel time involved is "extraordinary." For instance, if an employee normally travels one hour from home to work, but is sent to a job site four hours away, the Department of Labor considers three of the four hours to be compensable travel time.



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### 2. Compensable Travel Time

Under some conditions, an employee must be paid for his travel time. For instance, when an employee travels from home to a fixed work location, but is then sent from that fixed location to work at a remote job site, he must be paid for the time spent traveling from the fixed work location to the remote job site.

Additionally, an employee who regularly works in a fixed location in one city, but who travels to another city for a one-day work assignment must also be compensated from the time he arrives at his point of departure, until the time he arrives at home. Thus, where an employee is given a special one-day assignment in another city, travel time is compensable, except for the portion which would normally be excluded under the "home-to-work" category, such as travel time from home to the train station or airport.

Under the FLSA, travel that keeps an employee away from home overnight is called "travel away from home." Travel away from home is considered work time under the FLSA when it cuts across the employee's normal workday, and the employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours, but also during the corresponding hours on nonworking days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday, the travel time during these hours is considered work time on Saturday and Sunday as well.

## E. On-Call Time

Claims by employees who spend time "on-call," in order to respond to emergencies, are also on the rise. Frequently, these situations involve employees who must remain within a certain radius of their site of employment in order to respond to an emergency, cannot drink alcohol during their on-call time, and must be available by pager or phone at all times. Whether or not this time is compensable under the FLSA turns on whether or not the employee's time is their more or less their own, or whether the on-call limitations restrict the employee's activities so much that they are essentially working for the employer during the entire on-call period.

Specifically courts consider: (1) the number of calls an employee typically receives; (2) required response time; and (3) the employee's ability to engage in personal pursuits while on call. While most courts have found on-call time to be non-compensable, a few prominent cases have found that frequency of calls (three to five in an on-call period), combined with a short required response time (fifteen minutes or less), require employers to pay employees for the entire on-call period.



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## F. Final Paychecks

Because the FLSA does not have any provisions regarding the issuance of a final paycheck, when a final paycheck must be made is determined on state-by-state basis. For example, Georgia and Florida do not require a final paycheck to be issued at any particular time. Other states, however, do have such statutes. For instance, in Colorado a terminated employee must be paid his/her wages due immediately upon termination; whereas, an employee that quits or resigns must be paid by the next regular payday. Another example is Illinois, which requires an employee that ends his/her employment (regardless of voluntary or involuntary) to be paid in full at the time of their separation, if possible, otherwise no later than the next regular payday.

## G. The Bottom Line

Although the liability to individual employees for misclassifying meals, breaks, on-call, traveling and/or waiting and walking time may not be substantial enough to create a financial crisis, the collective amount owed to a large group of employees, particularly when calculated over the weeks and months of non-compliance, may create a significant negative impact on the employer's bottom line. Because of the anticipated increase in collective action lawsuits in these areas, employers should consult with counsel to determine whether their compensation practices are compliant with the FLSA.

# X. RECORD KEEPING REQUIREMENTS

In addition to imposing minimum wage and overtime requirements, the FLSA also imposes certain record keeping requirements. Failure to satisfy the record keeping requirements of the FLSA alone may be punishable by criminal penalties. Additionally, an employer's failure to maintain necessary payroll records may be detrimental to the employer's subsequent efforts to defend any claim brought under the FLSA. Furthermore, the Secretary of Labor is empowered to examine an employer's payroll records for the sole purpose of determining whether any FLSA record keeping violations have occurred.

The FLSA regulations do not require that records be kept in any particular form. For example, the Administrator of the Wage and Hour Division has ruled that the use of time clocks for the purpose of recording hours of work is not required. Instead, the employer's records may be preserved in virtually any form, provided that adequate projection, retrieval or viewing equipment is available and clear and identifiable reproductions of the records may be made. Just remember, it is the employer's obligation to maintain records that accurately reflect hours worked – a failure of the employee to keep such records is no excuse.

For employees who are subject to the minimum wage and/or overtime provisions of the FLSA, an employer must maintain and preserve payroll records containing the following information:

1. The employee's full name, as used for Social Security record keeping purposes;
2. Home address including zip code;
3. Date of birth, if under age 19;
4. Sex and occupation in which employed;
5. Time of day and day of week on which the employee's workweek begins (if an employee is part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of day and beginning day of the workweek for the whole work force or establishment will suffice);
6. Regular hourly rate of pay for any workweek in which overtime compensation is due, including
   (a) An explanation of the basis of the employee's pay indicating the monetary amount paid on a per hour, per day, per week, per piece, commission, or other basis; and
   (b) The amount and nature of each payment made that is excluded from the employee's regular rate of pay;
7. Total hours worked each workday and workweek;
8. Total daily or weekly straight time earnings or wages due for hours worked;
9. Total premium pay for overtime hours;
10. Total additions to or deductions from wages paid each pay period;
11. Total wages paid each pay period; and
12. Date of payment and the pay period covered by the payment.

Employers are also required to keep similar records reflecting any retroactive payment or wages or compensation required by the Administrator of the wage and Hour Division.

Many employees work on fixed schedules. In these cases, the hours per day need not be kept. It is sufficient to indicate the normal daily and weekly hours and indicate if this schedule is followed. When the schedule is not worked, the exact number of hours for each day must be indicated.

With respect to employees who are exempt from the minimum wage and overtime requirements, employers are required to maintain and preserve records showing items 1 through 4. Additionally, employers are required to show the basis on which an exempt employee's wages were

paid in sufficient detail so as to permit calculation of the employee's total compensation for each pay period, including fringe benefits.

With respect to employees exempt from overtime pay requirements, employers must maintain and preserve records showing all items except 6 and 9. Additionally, information must be maintained regarding the basis upon which wages are paid, such as the monetary amount paid per hour, per day or per week.

With respect to employees of hospitals and residential care facilities who reside on the premises and are compensated for overtime work on the basis of a work period of 14 consecutive days, records must be maintained to show items 1-4, 6, and 10-12. In addition, the employer must maintain records that record:

1. Time of day and day of week on which the employee's 14 day work period begins;
2. Hours worked each day and total hours worked each 14-day period;
3. Total straight time wages paid during 14 days;
4. Total overtime paid for hours in excess or 8 per work day and 80 per work period; and
5. Copy of the agreement or understanding for using the 14 day period for overtime pay computations, the date of agreement entered and the duration of the agreement.

Employers are required to maintain the above payroll records for three years from the last date of entry. Employers are also required to maintain any certificates, agreements, plans, notices and the like that affect the terms and conditions of employment or compensation for three years from the last effective date of the document. Finally, employers must preserve basic employment and earnings records, including wage rate tables, for a period of at least two years.

Records must be kept so that they may be retrieved within 72 hours. It is typically in the best interest of the employer to maintain records in a straightforward and self-explanatory manner. Employers may be required to recompute and transcribe computations made from the records and submit them to the Wage and Hour Division.



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## XI. PENALTIES

### A. Minimum Wage And Overtime Violations

A civil penalty of up to $1,000 per violation may be assessed against any person who repeatedly or willfully violates the minimum wage or overtime provisions of the Act. There is a repeat violation where the employer previously violated the minimum wage or overtime provision and received notice from the Wage and Hour Division that an alleged violation occurred, or where there has been a court finding that a violation has occurred. If an appeal is in progress, there can be no repeat violation based on the pending matter. A willful violation of the Act is found when the employer knew its conduct was prohibited by the Act or showed reckless disregard of the Act's requirements.

The Administrator determines the amount of the penalty. That amount is based on the seriousness of the violation and the size of the employer. Several factors may be considered in assessing a penalty; they include:

1. Whether the employer has made a good faith effort to comply;
2. The employer's explanation for the violation;
3. The previous history of violations;
4. The employer's commandment to further compliance;
5. The interval between violations;
6. The number of employees affected; and
7. Whether there is any pattern to the violations.

### B. Contesting A Penalty

The employer can request an administrative hearing within 15 days of receipt of the penalty notice. The penalty is final if the request is not filed within 15 days. An administrative law judge (ALJ) is appointed. The ALJ rules on whether a violation has occurred. The ALJ's decision can be appealed to the Secretary of Labor within 30 days of the ALJ's decision. If a timely appeal is not filed, the ALJ's decision is final.

### C. Criminal Prosecution

Criminal prosecution can be brought against an employer, as well as its officers, for a willful violation of the FLSA. If found guilty, an employer or officer may be fined up to $10,000. For second convictions, offers may be given up to a six-month prison sentence, in



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addition to a fine. Examples of conduct that have resulted in criminal prosecution are the falsification of records and retaliatory discharge or discipline.

## XII. HOW TO RESPOND TO A WAGE-HOUR INVESTIGATION

### A. Introduction

Winning a wage-hour investigation revolves around one basic concept. You must control the investigation. While this sounds simple enough, it is often very difficult to achieve because of the variables that can enter into such an investigation. The DOL enjoys wide latitude in its investigation of any complaint regarding wages, hours, or other conditions and practices of employment covered by the FLSA. In recent years a majority of complaints filed under the FLSA concern overtime pay practices. Investigations, of course, may vary because of the differences in the allegations.

Investigations also may vary for reasons totally unrelated to the complaint that initiated the investigation. Different investigators will have different techniques they follow in conducting their investigation. The manner in which an investigator approaches a complaint may be dependent upon that person's case load, the amount of time the individual can devote to the particular investigation or simply because of his or her own diligence. In addition, the information elicited during the initial investigation of the complaint can affect the depth of the investigation conducted and the amount of time the DOL will spend investigating a complaint.

Generally, an employer will first learn that a complaint has been filed against it when it receives a Notice from the DOL. A copy of the complaint may be attached to this form and the form will either advise the company that no action by the company is required at that time or request that the company file a written response that may include the preparation of documents (e.g. payroll records) necessary to respond fully to an attached Request for Information by a certain date. Regardless of which of these three courses the DOL may follow at this point, the employer should not procrastinate. It is imperative that the employer initiates its own investigation of the allegations in the complaint immediately. If it does not, it may lose evidence vital to its defense of the complaint. In addition, and more importantly, an employer's own investigation may evidence its good faith.

An employer is required to preserve payroll and personnel records relevant to a complaint until disposition of the complaint or any subsequent litigation. It is, therefore, necessary for the employer to immediately investigate the allegations of the complaint, determine what documents and evidence it has in its possession that may be even remotely relevant to the allegations raised therein, and preserve such documents and evidence for the subsequent investigation or litigation that

may follow. The closer an employer is in time to the event(s) that are the subject of the complaint, its chances of constructing an effective defense increase dramatically.

You may determine from your investigation that some or all of the allegations are true or that you have little or no support for your position. If you encounter that unfortunate situation, you may wish to seriously consider the possibility of a pre-investigation settlement. If you have little hope of prevailing, the best and least expensive chance you have of resolving the case is prior to the investigation. Prevailing in a wage-hour investigation can simply be getting out of it as quickly and as cheaply as possible. Therefore, when you conduct your own investigation you must evaluate the merits of your defenses and make a determination as to whether it is best to contest the complaint or instead settle. If it appears that the latter option is in your best interest, you must make a determination as to what the settlement is worth to you from an economic, temporal, and morale standpoint. Remember, settling a complaint is strictly a matter of negotiation and value.

**B. <u>Respond To The Complaint As Soon As Possible</u>**

Even if the Notice states that action is not required at the time, it is strongly recommended that a response be filed as soon as possible along with any supporting evidence you may have. At that point in time, it is likely the DOL investigator assigned to the matter knows little, if anything, about it. If she has the employer's response and supporting evidence in the file when she begins the investigation, however, she will logically have a better idea of the circumstances surrounding the complaint from the information supplied by the employer in support of its position. By taking the initiative, the employer as initiated the first step in controlling the investigation.

A Notice that includes a Request for Information invariably seeks information by a date that will be very difficult for you to meet. There are no subtleties to this date and an employer is not necessarily bound by it if the deadline creates a hardship or is difficult to meet. As a practical matter, however, the date should not be ignored. If you cannot respond by the date indicated on the notice, either call or write the investigator to set a reasonable time when you can reasonably comply with the Request for Information.

In most cases, when the DOL issues its Request for Information, it has yet to conduct an investigation of the particulars of the complaint other than to read the allegations set forth therein. Information may have been provided by the complaining party at the initial interview when the complaint was filed. As such, the investigator generally has very little background information, which would allow her to determine what information may be relevant to the allegations raised in the complaint. Therefore, the investigator will normally attach a list of questions that the DOL has determined, through investigation of similar charges, <u>might</u> be generally relevant to allegations of the kind raised in the complaint that has been lodged against you.

More often than not, much of the information requested will not be remotely relevant to the specific allegations at issue, but will instead consent to a standard list of information utilized by the DOL. Simply because the DOL has requested the information does not mean that it should be voluntarily provided to the Agency. It is imperative that the investigation be kept as narrow as possible in scope. Further, you want to provide information that will convince the DOL that no illegal pay practices have occurred.

You should not provide information that you do not believe is relevant to the allegations raised by the complaining party or outside the scope of the actions that form the basis of the complaint. Instead, provide the DOL, as promptly as possible, with any information relevant to the allegations contained in the complaint and an explanation why other information is being withheld. If it determines that it really needs or wants the additional information, the DOL has subpoena authority, which it may utilize. When necessary, courts will enforce the Agency's broad subpoena power, at the employer's expense. Absent extraordinary circumstances, however, the DOL rarely utilizes this power. It is advisable to take advantage of the fact that the subpoena power is sparingly invoked by not being afraid to structure your defense to maximize your position. The DOL may be persuaded by your written response and accompanying documentation that the additional requested information is unnecessary.

Although much of the information requested by the DOL may be totally irrelevant to the allegations raised in the complaint, other information may exist that has not been requested by the DOL which is very relevant and very favorable to the employer's position. Accordingly, the company must be not only thorough, but also imaginative, in its own investigation of the allegations and in constructing its defense to any complaint of illegal pay practices. If information is available that has not been requested yet is helpful to the company's position, it should be included in the company's response to the Request for Information.

It is imperative to remember, however, that the opposing party can obtain any statements or information that you provide to the DOL in the event that litigation ensues. Therefore, you must carefully: construct your answers to any questions raised by the DOL; screen any documentation you give to the DOL; and you must carefully phrase any statements of position or affidavits to ensure that they cannot be used against you in any subsequent litigation. Do not prepare statements or provide answers to questions unless you know those statements and answers are completely correct. In simple terms, do not guess and, most importantly, never fabricate.



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## C. Prepare For The On-Site Investigation

The investigator may determine that an on-site investigation is necessary, which is wholly within its authority, especially when the complaint concerns whether or not certain jobs are exempt from the FLSA's overtime compensation requirements. An on-site review is also likely to occur in cases, which involve considerable documentation. If voluminous documents must be provided or reviewed to support the company's position, it may be in the company's best interests to have an on-site investigation. Indeed, in such cases, you may even want to suggest it. In those circumstances, an investigation will give you the opportunity to explain any files or documents at the time they are reviewed. Additionally, such an investigation will normally result in the investigator requesting fewer documents for her file than she originally sought.

The danger always exists, however, in any on-site investigation, that the investigator will attempt to expand her review beyond what was originally contemplated. This possibility amplifies the importance of the company being extremely thorough in its own investigation. It must determine whether any problem areas exist that should be avoided in the investigation. If those detrimental areas develop, and the investigator consequently attempts to probe into areas outside the scope of the complaint, the company must attempt to limit the investigator's access to those areas. Unless this is tactfully done, however, the investigator will sense that the employer is trying to hide something and will vigorously pursue the request, perhaps even to the point of enforcing the Agency's subpoena power.

Sometimes it is best to avoid an on-site investigation unless the company is completely satisfied that the investigation will not reveal any adverse information. It is possible to dissuade an investigator from conducting an on-site investigation by suggesting that she wait until she obtains your written answer and documents submitted in response to her Request for Information before determining whether or not she feels it necessary to conduct an on-site investigation. If you have been thorough and persuasive in the information that you provide, the chances are good the investigator will find an on-site investigation unnecessary.

Regardless of the course an investigation may take, it must be approached by the company as being critically important. More often than not, the investigator will confirm that no violations occurred. That scenario, of course, is the easiest and least expensive way to prevail. Even if litigation follows, the investigation will provide the foundation for your defenses. If you are not extremely thorough, however, the information discovered during the course of the investigation may support the plaintiff's position in court. The investigation may also result in expanded litigation, including class actions or allegations and issues not contained in the original charge. Even though a charge may appear simple, it can result in a major lawsuit if not properly handled.



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Finally, a DOL investigation should not be conducted by anyone who is not experienced in such matters. A person who is a novice to these investigations should learn from an expert. Do not attempt to learn as you go through an investigation by yourself. A person who follows that procedure will undoubtedly learn from her mistakes. Unfortunately, the results of the learning experience can end in disastrous results for your company.





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